The Moscow Stars – Charter Party Liens and Arbitration

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1. The English Court's decision in The Moscow Stars[1] is a boon to all charterparty lien holders. The decision endorsed the ground-breaking judgment in Singapore's Five Ocean Corp[2] and thereby enriched a stream of jurisprudence that will only add to the popularity of maritime arbitration.

2. This article will examine the judgment of The Moscow Stars. It will argue that it – and by extension Five Ocean Corp – sheds light on the application of the Malaysian Arbitration Act 2005[3] and should therefore be of persuasive value in Malaysian courts.

The Judgment and the Issues

3. The judgment in The Moscow Stars was handed down by Mr Justice Males, as he was then known. Sir Stephen Martin Males is a commercial law and arbitration specialist. He practised for many years at 20 Essex Street – a leading commercial set – prior to his appointment as a Justice of the High Court of England and Wales.

4. The key issue before the court was this: Whether charterparty lien holders can exercise their lien to sell cargo on board a vessel whilst the underlying dispute is subject to arbitral proceedings?

5. Arguments at the hearing were divided into two heads. These are (i) whether the goods subject to the lien must also be the 'subject' of the arbitral proceedings; and, (ii) what circumstances might constitute 'good reason' for a quick sale of the cargo.

6. This article will discuss both issues. It will first discuss the circumstances that might call for a quick sale of the cargo, an inevitable requirement in applications of this nature. It will then discuss whether the goods must be the subject of arbitral proceedings (as distinct from them having nothing to do with the underlying dispute).

7. This article will lastly examine the interesting argument raised by the claimant in Five Ocean Corp – that the wording of Singapore's International Arbitration Act[4] permitting the preservation of property subject to a charterparty lien did in fact allow the court to sell the cargo.

The Facts

8. In The Moscow Stars, the claimant shipowner (the 'Claimant') time-chartered the vessel "MOSCOW STARS" to the defendant charterers, PDVSA, a Venezuelan state-owned company (the 'Defendant'). Cargo – 50,000 metric tones of crude oil in total

1 [2017] EWHC 2150 (Comm).

2 Five Ocean Corp v Cingler Ship Pte Ltd (PT Commodities & Energy Resources, Intervener) [2015] SGHC 311 (hereinafter known as 'Five Ocean Corp').

3 Act 646.

4 Cap 143A, 2002 Rev Ed.

- was loaded at Venezuela and the vessel was ordered to Freeport, the Bahamas, for discharge.

9. Due to the Defendant's failure to pay charterparty hire, however, the Claimant gave notice of exercise of a lien over the cargo. This was pursuant to the usual charterparty clause conferring shipowners with a lien over all sums due under the charter.[5] The vessel later sailed to Bullen Bay, Curacao, and remained there whilst awaiting the resolution of the dispute.

10. Parties commenced arbitration pursuant to the London arbitration clause contained in the charterparty. The Claimant sought and obtained permission from the arbitral tribunal to apply to the court for an order for the sale of the cargo.

11. Whilst awaiting the court's determination of its application, the Claimant is incurring all the usual costs of running the vessel, including the costs of supplying bunkers and paying the crew. These are costs that the Defendant was expected to foot, but has failed to do so.

12. The vessel is scheduled for inspections required by SOLAS[6] and her classification society and therefore has to be cargo-free by those inspection dates.

A Discussion of the Moscow Stars

What might constitute 'good reason' for a quick sale of the cargo?

13. In The Moscow Stars, it was a requirement in law that the cargo had to be of a perishable nature (which was not in fact the case) or that there was good reason for a quick sale. In other words, the Claimant had to show that their application was time-sensitive in order to succeed.

14. Similarly, the claimant in Five Ocean Corp had to demonstrate the urgency and necessity for the order of sale.

15. There is no similar requirement under the Arbitration Act 2005. But it is submitted that it is inevitable that applications of this nature under Malaysian law will allude to similar facts, given the rapid escalation of costs that

5 [See Lines 110 to 113 of the New York Produce Exchange Form 1946 and Lines 219 to 224 of the Baltime 2001 Form, for example.

6 The International Convention on the Safety of Life at Sea, generally regarded as the most important treaty concerning the safety of merchant ships.

comes with storing cargo on board a vessel for a prolonged period of time. This increase in costs should, it is submitted, be taken into account by the courts when weighing the merits of the application.

16. The Claimant in The Moscow Stars attempted to meet this requirement by pointing to the fact that the cargo had been on board the vessel for nine months and, in the absence of a sale order, will remain there for many months to come.

17. This prejudice, the Claimant argued, is compounded by the fact that the Claimant is not receiving hire but is incurring the expense of operating the vessel. Further, the vessel had to be cargo-free given that the deadlines to comply with SOLAS and Class requirements were fast approaching. The Claimant's stand was inevitably aided by the Defendant's concession that there was no viable storage possibility for the cargo.

18. In the same vein, the claimant in Five Ocean Corp pointed to the fact that overheating of the cargo – in that case, 77,000 mt of Indonesian steam coal – had been detected. Further, there was a risk that it would self-ignite if it continued to remain in the vessel's hold.

19. They also relied on the fact that monsoon season at the Bay of Bengal – where the vessel was situated – was exacerbating the already dire situation. The court in Five Ocean Corp also accepted the claimant's evidence that Indian law did not recognise their lien if the cargo was discharged in India.

20. Males J in The Moscow Stars accepted the Claimant's arguments that there was good reason for a quick sale. He was, it is submitted, particularly persuaded by the length of time that the cargo had been onboard the vessel and the risk that the dispute will drag on indefinitely if a sale order was not made.

Whether the goods must be the subject of arbitration proceedings?

21. The discussion under this heading turns on the provisions of the United Kingdom's Arbitration Act 1996.[7] The Arbitration Act 2005, prior to its latest amendments,[8] had similar wordings to the United Kingdom's Act.

22. The relevant provisions of section 44 of the Arbitration Act 1996 reads as follows:

"(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for purposes of and in relation to legal proceedings.

(2) Those matters are –

…

(b) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings –

(i) for the inspection, photographing, preservation, custody or detention of the property, or …

(ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property; and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;

…

(d) the sale of any goods the subject of the proceedings; … ".

23. The Claimant relied on s44(2)(d) of the Arbitration Act 1996, thereby seemingly limiting the court's power to order the sale of the cargo to where they are "the subject of" the London arbitral proceedings.

7 Arbitration Act 1996 (c.23).

8 Arbitration Amendment (No. 2) Act 2018 (Act A1569), which enacts the provisions of the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006).

24. The Defendant argued that unless the cargo was the "subject" of arbitral proceedings, the court's power cannot be exercised. An example proffered of the cargo being the "subject" of proceedings was a dispute over the ownership of the goods.

25. The Defendant said that the circumstances in which the power to sell cargo can be exercised was deliberately narrow, given its draconian effect of depriving a party of its ownership of cargo where the claimant's right is yet to be established.

26. In contrast, the Defendant pointed out, the orders contemplated in s44(2)(c) of the Arbitration Act 1996 – inspection, photographing, preservation, custody, detention, sampling, observation and experimentation – were much less intrusive and can therefore be made in more extensive circumstances.

27. They conceded, however, that where the cargo and its condition is a major issue in arbitration proceedings – due to it deteriorating significantly in condition and value – the cargo would inevitably become "the subject of the proceedings."

28. In reply, the Claimant argued that the Defendant's reading of the statute was too restrictive. They said that the phrase "goods the subject of the proceedings" meant no more than that the proceedings should relate to or concern the goods in question.

29. The court reached its conclusion by striking a middle-path. It held that there was a sufficient nexus between the cargo and the arbitral proceedings. This, it said, was because the lien is being exercised over the Defendant's goods as security for a claim being advanced in arbitration and, as a result, there is an impasse between the parties pending issuance of the arbitration award.

The Argument in Five Ocean Corp

30. The claimant in Five Ocean Corp argued that the property subject to the lien can be preserved by selling it.

31. This point is especially important in the Malaysian context as Five Ocean Corp was decided under s12(1)(d) of Singapore's International Arbitration Act,[9] which has similar provisions to the post-amendment Arbitration Act 2005.[10]

32. In making this argument, the claimant relied on the English decision of Cetelem SA[11] where the English Court of Appeal remarked that the court could preserve perishable cargo by selling it, thereby preserving the value of the cargo rather than the cargo itself.

33. The court in Five Ocean Corp accepted this argument and remarked that this argument was in keeping with the power conferred to the court under Order 29 Rule 4 of the Singapore Rules of Court[12] (similar to Order 29 Rule 4 of the Malaysian Rules of Court 2012), which permitted the sale of perishable property.

The Conclusion

34. The judgments in both The Moscow Stars and Five Ocean Corp augur well for the Malaysian maritime arbitration scene.

35. This is for two reasons: Firstly, they were decided under provisions similar to those found in the Arbitration Act 2005. And secondly, they have read those provisions in a pro-arbitration yet industry-friendly manner. The judgments successfully strike a balance between the competing parties and the various commercial considerations.

36. Malaysian courts would do well, it is submitted, to adopt the reasoning – and the spirit – in which these judgments were written. ■

9 Cap 143A, 2002 Rev Ed.

10 See the new s19(2)(c) Arbitration Act 2005.

11 Cetelem SA v Roust Holdings Ltd [2005] 1 WLR 3555 at [65].

12 Cap 322, R 5, 2014 Rev Ed.